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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 UNITED STATES OF AMERICA,

Case No. 2:15-CR-11 JCM (CWH)

8 Plaintiff(s),

ORDER

9 v.

10 DESHAWN WALKER,

11 Defendant(s).
12

13 Presently before the court is petitioner Deshawn Walker's motion to vacate, set aside, or
14 correct sentence pursuant to 28 U.S.C. § 2255. (ECF No. 183). The government has not filed a
15 response, and the time for doing so has since passed.

16 Also before the court is petitioner's request for status regarding his motion to vacate. (ECF
17 No. 185).

18 **I. Facts**

19 On January 6, 2016, the government brought a superseding indictment charging the
20 petitioner with: 1) conspiracy to commit armed bank robbery; 2) armed bank robbery, in violation
21 of 18 U.S.C. § 2113(a) and (d); and 3) use of a firearm during and in relation to a crime of violence
22 ("use of a firearm"). (ECF No. 85). On March 1, 2016, petitioner pleaded guilty to armed bank
23 robbery in violation of 18 U.S.C. § 2113(a)¹ and use of a firearm.
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¹ Neither the plea agreement nor the judgment reference 18 U.S.C. § 2113(d).

1 On June 1, 2016, the court sentenced petitioner to 12 months for armed bank robbery and
2 84 months for use of a firearm to run consecutively for a total of 96 months.² Petitioner did not
3 appeal his sentence.

4 In the instant motion, petitioner moves to vacate pursuant to *Johnson v. United States*, 135
5 S. Ct. 2551 (2015) (“*Johnson*”). (ECF No. 183).

6 **II. Legal Standard**

7 Federal prisoners “may move . . . to vacate, set aside or correct [their] sentence” if the court
8 imposed the sentence “in violation of the Constitution or laws of the United States . . .” 28 U.S.C.
9 § 2255(a). Relief pursuant to § 2255 should be granted only where “a fundamental defect” caused
10 “a complete miscarriage of justice.” *Davis v. United States*, 417 U.S. 333, 345 (1974); *see also*
11 *Hill v. United States*, 368 U.S. 424, 428 (1962).

12 Limitations on § 2255 motions are based on the fact that the movant “already has had a fair
13 opportunity to present his federal claims to a federal forum,” whether or not he took advantage of
14 the opportunity. *United States v. Frady*, 456 U.S. 152, 164 (1982). Section 2255 “is not designed
15 to provide criminal defendants multiple opportunities to challenge their sentence.” *United States*
16 *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

17 **III. Discussion**

18 In the instant motion, petitioner requests that the court vacate his conviction under § 924
19 pursuant to *Johnson*. (ECF No. 183). In particular, petitioner argues that his conviction under 18
20 U.S.C. § 924(c)(1)(A)(ii) violates the Constitution’s guarantee of due process. *Id.*

21 In *Johnson*, the United States Supreme Court held the residual clause in the definition of a
22 “violent felony” in the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B) (“ACCA”),
23 to be unconstitutionally vague. 135 S. Ct. at 2557. The ACCA defines “violent felony” as any
24 crime punishable by imprisonment for a term exceeding one year, that:

25 (i) has as an element the use, attempted use, or threatened use of physical force
26 against the person of another; or

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28 ² The statute of conviction, 18 U.S.C. § 924, imposed a mandatory minimum seven-year
consecutive sentence. 18 U.S.C. § 924(c)(1)(A)(ii).

1 (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise*
2 *involves conduct that presents a serious potential risk of physical injury to*
3 *another*.

4 18 U.S.C. § 924(e)(2)(B) (emphasis added). The emphasized above is known as the ACCA’s
5 “residual clause.” *Johnson*, 135 S. Ct. at 2555–56. The Court held that “increasing a defendant’s
6 sentence under the clause denies due process of law.” *Id.* at 2557.

7 Petitioner asserts that his conviction is not subject to the provisions of § 924(c)(3) because
8 his underlying conviction (armed federal bank robbery) does not constitute a “crime of violence.”
9 (ECF No. 183). Petitioner argues that his sentence is unconstitutional under *Johnson* because
10 *Johnson*’s holding applies equally to the residual clause in § 924(c). *Id.* Petitioner thus maintains
11 that *Johnson*’s holding renders the government unable to prove that armed bank robbery
12 constitutes a crime of violence without relying on the residual clause. *Id.* The court disagrees.

13 Subsection (3) of § 924(c) defines the term “crime of violence” as an offense that is a felony
14 and—

15 (A) has as an element the use, attempted use, or threatened use of
16 physical force against the person or property of another, or

17 (B) that by its nature, involves a substantial risk that physical force
18 against the person or property of another may be used in the course
19 of committing the offense.

20 18 U.S.C. § 924(c)(3).

21 To sustain a conviction for the offense of armed bank robbery, the government must prove
22 either the defendant assaulted another person by the use of a dangerous weapon or device, or that
23 he put another person’s life in jeopardy by the use of the dangerous weapon or device. *See* Modern
24 Fed. Jury Instructions 53-14.

25 Prior to the Supreme Court’s holding in *Johnson*, Ninth Circuit caselaw discussing §
26 2113(a) held that armed bank robbery under the statute constituted a crime of violence. *See United*
27 *States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000) (citing 18 U.S.C. § 2113(a)) (“Armed bank
28 robbery qualifies as a crime of violence because one of the elements of the offense is a taking ‘by
force and violence, or by intimidation.’”); *see also Selfa*, 918 F.2d at 751 (“We therefore hold that

1 persons convicted of robbing a bank ‘by force and violence’ or ‘intimidation’ under 18 U.S.C. §
2 2113(a) have been convicted of a ‘crime of violence’ within the meaning of Guideline Section
3 4B1.1.”). Petitioner asks the court to revisit this question in light of *Johnson*.

4 In 2016, the Ninth Circuit was confronted with the essentially same argument that
5 petitioner raises here, that “because Hobbs Act robbery may also be accomplished by putting
6 someone in ‘fear of injury,’ 18 U.S.C. § 1951(b), it does not necessarily involve ‘the use, attempted
7 use, or threatened use of physical force,’ 18 U.S.C. § 924(c)(3)(A).” *United States v. Howard*, 650
8 Fed App’x. 466, 468 (9th Cir. 2016). The court held that Hobbs Act robbery³ nonetheless qualified
9 as a crime of violence under the force clause:

10 [Petitioner’s] arguments are unpersuasive and are foreclosed by
11 *United States v. Selfa*, 918 F.2d 749 (9th Cir.1990). In *Selfa*, we
12 held that the analogous federal bank robbery statute, which may be
13 violated by “force and violence, or by intimidation,” 18 U.S.C. §
14 2113(a) (emphasis added), qualifies as a crime of violence under
15 U.S.S.G. § 4B1.2, which uses the nearly identical definition of
16 “crime of violence” as § 924(c). *Selfa*, 918 F.2d at 751. We
17 explained that “intimidation” means willfully “to take, or attempt to
18 take, in such a way that would put an ordinary, reasonable person in
fear of bodily harm,” which satisfies the requirement of a
“threatened use of physical force” under § 4B1.2. *Id.* (emphasis
added) (quoting *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th
Cir. 1983)). Because bank robbery by “intimidation”—which is
defined as instilling fear of injury—qualifies as a crime of violence,
Hobbs Act robbery by means of “fear of injury” also qualifies as
crime of violence.

19 650 Fed. App’x. at 468.

20 Since *Howard*, at least four courts in this district have held that § 2113 robbery is a crime
21 of violence under the force clause.⁴ See *United States v. Wesley*, 241 F. Supp. 3d 1140, 1145 (D.
22 Nev. 2017) (Hicks, J.); *United States v. Ali*, no. 2:06-cr-00160-APG-RJJ, 2017 WL 3319115, at
23 *2, *2 n.9 (D. Nev. Aug. 3, 2017) (collecting cases from the District of Nevada and other districts);
24 *United States v. Tellez*, no. 2:02-cr-00279-JAD-VCF, 2017 WL 2192975, at *2-3 (D. Nev. May

26 ³ The court in *Howard* analogized Hobbs Act robbery to § 2113. See *id.*

27 ⁴ In addition, two courts in this district have found that “Hobbs Act robbery is categorically
28 a crime of violence under the force clause.” *United States v. Mendoza*, no. 2:16-cr-00324-LRH-
GWF, 2017 WL 2200912, at *2 (D. Nev. May 19, 2017); see *United States v. Barrows*, no. 2:13-
cr-00185-MMD-VCF, 2016 WL 4010023 (D. Nev. July 25, 2016).

1 18, 2017); *United States v. Loper*, 2:14-cr-00321-GMN-NJK, 2016 WL 4528959, at *2 (D. Nev.
2 Aug. 29, 2016).

3 The court holds that armed robbery in violation of § 2113(a) constitutes a crime of violence
4 under § 924(c)(3)'s force clause. Under the elements set forth in the language of § 2113(a) and
5 (d), petitioner's underlying felony offense (armed bank robbery) is a "crime of violence" because
6 the offense has, "as an element the use, attempted use, or threatened use of physical force against
7 the person or property of another." 18 U.S.C. § 924(c)(3)(A); *see Wesley*, 241 F. Supp. 3d at 1145.
8 Therefore, *Johnson* is inapplicable here because petitioner's sentence does not rely on the residual
9 clause of § 924(c).

10 In light of the foregoing, petitioner has failed to show that his sentence is unconstitutional
11 under *Johnson* or otherwise. Accordingly, the court will deny petitioner's motion to vacate, set
12 aside, or correct sentence pursuant to 28 U.S.C. § 2255.

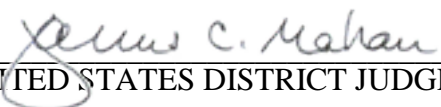
13 **IV. Conclusion**

14 Accordingly,

15 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that petitioner's motion to
16 vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 183) be, and the same
17 hereby is, DENIED.

18 IT IS FURTHER ORDERED that petitioner's request for status (ECF No. 185) be, and the
19 same hereby is, DENIED as moot.

20 DATED May 23, 2018.

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22 UNITED STATES DISTRICT JUDGE
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